The Central Law Journal.

ST. LOUIS, AUGUST 24, 1883.

CURRENT TOPICS.

Some of our eastern contemporaries are discussing the practicability of introducing into the conveyancing of the present, shorter forms of mortgages and deeds. The law has unquestionably made great progress in the last thirty years in the task of ridding itself of superfluous forms and verbiage, but the degree of improvement in this respect is not equal in the different departments of the legal science, and many corresponding superfluities to those which have been so successfully weeded out of the system of pleading, still inhere in the law of conveyancing, which naturally inherits many of the artificialities and formalities of the feudal system that have long since become entirely meaningless. Still, any reform which is undertaken in this respect must, in the absence of legislation, as was recently very pertinently observed by a correspondent of the *New York Daily Register*, be by way of perilous experiments on clients' interest, and consequently can not be expected to meet with any marked degree of favor on the part of the profession or public. That the legislature has been slow to act in this matter, is probably due to the fact that the interests most affected are purely private ones, and that the inconvenience arises in a multitude of isolated cases. It would seem, however, that the time has arrived when some legislative action is desirable, though the difficulties of making such legislation effective are manifest. It is proposed in a bill drafted by another correspondent of the *Register* to provide, for the sake of brevity of covenants, that a short covenant, for instance, "that the land is free from incumbrances," shall be construed as meaning the same as the long covenant now used enumerating gifts, grants, titles, charges, estates, judgments, taxes, assessments, etc., etc.; and so on for each of the usual covenants in a full deed, and this is thought to be declaratory of the law as it now stands. Land is to include all tenements, hereditaments and appurtenances. The joining of a wife in a deed is to bar her dower. "A conveyance of land shall be valid although no consideration be expressed therein, and every such conveyance is presumed to have been made for a valuable and sufficient consideration." There are other provisions not less important and some of them of questionable propriety which it is not necessary to enumerate, as those above quoted will sufficiently show the drift of the proposed measure, which, altogether, seems to us to be worthy of consideration.

SURVIVAL AND ASSIGNMENT OF ACTIONS.

The difficulty of understanding the precise doctrine of the common law, with respect to the survival of actions, has suggested the idea of a brief discussion of that topic. So far as statutes give or deny any right of action to the administrator or executor of the deceased, there can be no controversy; for the powers of the personal representation are then easily determined. It was only when the statutes are wholly silent, or make provision that merely certain actions shall survive in addition to those enumerated at common law, that any doubt arises.

Assignability.—Insomuch as the title of an executor or administrator to the effects of the deceased is regarded as a title by assignment, courts have very naturally concluded that the assignability or non-assignability of choses in action between living parties is a correct standard by which to determine what actions survive and what do not.

It is decidedly well established, then, that those actions which survive and are transmitted to the personal representation as assets are assignable; while those which do not pass to the administrator or executor are not assignable. The terms, then, may with propriety be used interchangeably, since the assignable quality of a chose in action aids very materially in determining the question of survival of the action. [1]

Actions by Administrator or Executor. Contracts.—According to the common law authorities, an executor stands in the place of his testator, and represents him as to all his personal contracts, and therefore may regu-

[1] Byxbie v. Wood, 24 N. Y. 607.

larly maintain any action in his right which he himself might.[2] Following this analogy, the rule from the earliest times has been, that such personal actions as are founded upon any obligation, contract, debt, covenant or duty which might have been sued upon by the testator in his lifetime, survives his death and descends to his executor or administrator,[3] unless the contract being still executory was purely personal to the deceased, or the injury resulting from its breach consisted entirely of personal suffering of the deceased. Contracts which stipulate solely for personal service, or skill of a contracting party, do not survive. Under this class are actions of a breach of promise of marriage, malpractice and the like.[4] The same is also true when the contract rests upon personal considerations, as the contract for personal services to be rendered between master and servant, or principal and agent, when the death of either party puts an end to the relation, unless there be a stipulation that such service shall continue after the death of the principal or master.[5] Again, an executor can not maintain an action on a breach of contract made with the deceased, when the damage consisted solely in the personal suffering of the deceased, without any injury to his personal estate, as, for instance, a breach of promise of marriage.[6] But on the other hand, when the executor can show that damage has occurred to the personal estate of the deceased by the breach of the express or implied contract, he may sustain an action to recover such damage, although the action is in some measure founded on a tort.[7] So, by waiving the tort in a trespass and suing for the value of the property, the action of assumpsit will lie.[8] Still it was a principle of the common law, that if an injury were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the injury was done; and from a misconstruction or misapplication of this doctrine, it is said, it was formerly doubted whether assumpsit would lie either for or against an executor, because the action, it was argued, was in form trespass upon the case, and therefore a supposed wrong, and in substance to recover damages only in satisfaction of the wrong.[9]

But upon careful consideration, it will be noticed that even if courts did so hold, that assumpsit would lie, it was not a misapplication of the principle; for it will be remembered that assumpsit being an action to recover damages for a breach of the contract, it was in consequence a correct conclusion. This statement, which seems to have been so universally conceded, seems to be altogether unwarranted. The tendency was in earlier times, in the absence of statutory aid, to extend the action of contract as far as was actually possible, in order that all actions, where it was possible to construe as based upon a contract, would survive. In consequence, certain actions were regarded as brought upon a contract, when strictly speaking, they were not in any sense of this nature.

So thoroughly was the principle, that an executor or administrator represented his testator in respect to all his personalities, incorporated in the common law, that it was held no words inserted in a contract transferring rights of action as to the same to another, will suffice to transfer such rights. There is an old reported case where an agreement was made to pay the intestate, or his order, or his heirs or executors, the sum of fifty guineas upon the happening of a certain event. Counsel for the plaintiff in error insisted that the declaration was bad, because it did not aver that such sum was not

[2] 2 Bac. Abr. Executors (n).

[3] Latch. 168, Cro. Car. 540; Cowp. 375; Wheatley v. Lane, 1 Saund. 216, note 1; Morley v. Polhill, 2 Ventr. 56; 3 Salk. 109; Pynchon's Case, 9 Rep. 89; Raymond v. Fitch, 2 Cr. M. & R. 588.

[4] Jabuske v. Smith, 13 N. Y. 333, per Denio, J.; Chamberlain v. Williamson, 2 M. & S. 408; Meech v. Stoner, 19, N. Y. 29; Wade v. Kalbfleisch, 58 N. Y. 282; 8 Mees. & W. Ex. 854.

[5] Farrow v. Wilson, L. R. 4 C. P. 745; Story on Agency, sec. 488.

[6] 2 Maule & S. 408; Smith v. Sherman, 4 Cush. 408; Beekham v. Drake, 8 M. & W. 854; Hovey v. Page, 55 Me. 142; Colt, J., in Kelly v. Riley, 106 Mass. 341; Harrison v. Moseley, 31 Tex. 608; Gibbs v. Belcher, 30 Id. 79; Woodward v. Chicago R. Co., 23 Wis. 400; Browner v. Sturdivant, 9 Ga. 69; Baltimore R. Co. v. Ritchie, 31 Md. 191; Stebbins v. Palmer, 1 Pick. 71; Latimore v. Simons, 13 Serg. & R. 183.

[7] Williams' Exr's. 676, citing 2 B. & B. 102; 4 J. B Moore, 532.

[8] 1 Bay (S. C.), 158.

[9] Norwood v. Read, Plow. 180; Berwick v. Andrews, 2 Ld. Raym. 974; Palmer v. Lawson, 1 Lev. 200; Slade v. Morley, Yelv. 20; Case of Marshalsea, 10 Rep. 77 *a*; Cro. Jac. 294, (S. C.); Pynchon's Case, 9 Rep. 86 *b*, 89 *a*.

paid to the heirs, to whom it was made payable as well as to the executors; but the court held the declaration good without such averment, because the thing contracted for was a mere personalty, and should rightfully go to the executors.[10] Therefore, if a man enters into an obligation with another to pay him or his heirs a certain sum of money, his executors or administrators shall have it and not his heirs.[11] In order that the personal representative of the deceased shall have a right to sue on a contract that the deceased might have sued upon in his lifetime, it is not necessary that the former should be named in the terms of it. For instance, if money be payable to A, who, before the agreement is completed, dies, the executor or administrator shall have a right of action to recover it.[12] Or if money be payable to C or his assigns, his executor shall recover it, for he is the assignee in law.[13]

To determine whether a right of action survives to the personal representative of the decedent, it becomes necessary to determine (and herein the sole practical obstacles lie), what particular contracts are purely personal, and what affect not only the person, but also the estate of the testator. When this has has been ascertained, it is not difficult to understand in what cases an action on a contract made with the testator will survive.

Torts.—The ancient rule in regard to the survival of actions which were founded upon contracts, was very much narrowed when the action was one for tort. It was then said, if the injury done to the person or property of another, was of such a nature that damages only could be recovered in satisfaction—where the declaration imputed a tort to another and the plea must be not guilty, the action died with the person to whom or by whom the injury was committed.[14]

In construing the maxim, *actio personalis moritur cum persona*, care must be exercised not to make the term personal actions too broad. In an extensive sense, all actions are divided into three classes merely, and those which do not arrange themselves under the title of real or mixed actions, must be personal; and if the maxim were extended to actions thus defined, it would be untrue. Consequently the term must be very much restricted within its usual limits. When the cause of action was founded upon any malfeasance or misfeasance, was a tort or arose *ex delicto*, as trespass for taking goods, trover, false imprisonment, assault and battery, slander, deceit, escape, etc., where the plea must be not guilty, the rule was that the action died with the person by whom the injury was committed, and no action could be maintained against his executor or administrator, although in some cases, such as the taking of goods, a remedy would remain against the representation for the value of the goods.[15] So, if the goods taken away continue still in specie in the hands of the wrong-doer, or of his executor, replevin or detainer would lie for or against the executor to recover back the specific goods;[16] or in case they were consumed, an action for money had and received, to recover the value.[17] But it seems when the wrong-doer acquired no gain, though the other party has suffered loss, the death of either party destroys the right of action.[18] Thus the administrator or executor may maintain an action of replevin in his capacity as representative of the deceased.[19] But when brought by such executor or administrator for a taking or detention from the deceased in his lifetime, the plaintiff must show a right of possession in the deceased, his death, together with the legal qualification of the plaintiff as such executor or administrator.[20]

The statute of 4 Ed. III, c. 7, gave to executors a remedy for a trespass down to the personal estate of their testators, which was afterwards extended to the executors of executors. By a broad construction of these

[10] Devon v. Pawlett, 11 Vin. Abr. 133, pl. 27.
[11] S. P. Fitz, N. B. 120, l., 9th ed.
[12] Com. Dig. As. B. 13.
[13] Pease v. Mead, Hob. 19. See also, Irenmonger v. Newsam, Latch, 201; 1 Roll. Abr. 915; Wentworth Ex. 215 (14th ed).
[14] Williams' Ex. 668, *et seq.*; 3 Blackstone Com. 302; 1 Saund. 216, note 1; Cowp. 371-377; Vinn. Abr. Executors, 123; Com. Dig., Admas, B. 13.
[15] Le Mason v. Dixon, Sir W. Jones, 174; Hole v. Bradford, Sir T. Raym. 57; Carter v. Fossett, Palm. 330; Perkinson v. Gilford, Cro. Car. 540; Kinsey v. Heyward, 1 Ld. Raym. 433; Hambley v. Trott, Cowp. 375; 2 Bac. Abr. 445.
[16] Sir W. Jones, 173, 174.
[17] Cowp. 377 *d*.
[18] United States v. Daniel, 6 How. 11; Cravath v. Plympton, 13 Mass. 454. See 1 Root (Com.), 216; Hambley v. Trott, Cowp. 376.
[19] Cravath v. Plympton, 13 Mass. 454; Hambley v. Trott, 1 Cowp. 374; Cummings v. Tindall, 4 Stew. & P. 361; Allen v. White, 16 Ala. 181.
[20] Halleck v. Mixer, 16 Cal. 574; Branch v. Branch, 6 Fla. 315.

statutes the executor or administrator was allowed the same actions for any injury done to the personal estate of the testator in his lifetime whereby it becomes less beneficial to the executor or administrator, as the deceased himself might have had, whatever the form of action might be.[21]

Injuries to the Person —In this connection I propose to confine the term personal injuries within still more restricted limits; to discuss more particularly the prominent features of actions brought for the death of an individual, through the fault or negligence of another person. We have already seen that injuries to the person do not survive, neither contracts which are of a purely personal nature. Injuries which result in the death of the injured party are among the first to which the rule would apply, and at common law, it will be distinctly remembered, the death of a human being, of itself, is not the ground of an action for damages.[22]

But a very material alteration was made in actions of this nature, by the passage of stat. 9 & 10 Vict. c. 93, better known as Lord Campbell's Act, and in this country by acts of a similar purport in most of the States. These, provide for the case where a wrongful act, neglect or default has caused the death of the injured person, and the injury is of such a nature that the injured person, had he lived, would have had an action against the wrong doer. In every such case the person who would have been liable, if death had not ensued, is still liable in damages and such action shall be for the benefit of the wife, husband parent and child of the person whose death shall have been so caused, but it shall be brought in the name of the executor or administrator of the deceased. The damages recoverable in an action of this sort, it has been held, are the pecuniary value of the life of the person killed, to the person for whom the suit is brought, and that exemplary damages by reason of the gross negligence of the wrong doer cannot be recovered.[23] It will be noticed that the action can only be maintained when the deceased himself could have maintained it, had not the injury resulted in his death; hence if the party injured had compromised for the injury or been guilty of contributory negligence, no action could be sustained by his representatives. Under this and similar acts, two actions might be sustained, one under the statute before referred to for the benefit of the family of the deceased, the other arising from an injury to his personal estate. This has been the model for acts in nearly all the States, so that the action for a tort now survives, and although the name of the plaintiff may differ in various States, yet the object aimed at is substantially the same in all, while the injured party, in an action against a carrier of passengers would have an election, whether to sue for the tort or breach of the contract to carry, yet in the absence of statutory power and injury to the personal estate, the administrator or executor has as little power to bring an action upon the breach of contract as upon the tort, since they both result in an injury merely personal. By altaining the theory of the action, the quality of survival cannot be altained in the least.[24] Neither is the verdict rendered in an action assignable until a judgment on it has been entered; for though the damages are liquidated, the verdict does not change the nature of the right until it has been placed upon record.[25]

Action against Executors or Administrators. Contracts.—Causes of action against an executor or administrator may arise in two ways out of the acts or default of the testator or intestate, or they may have their origin in some claim to a part in the distribution of the estate, our subject, however, confines us to the former. But it is the well settled law

[21] 1 Saund 217, (n); Lockin v. Patterson, 1 Car. & K. 271; Wilson v. Kunbly, 7 East. 134, 136; Latch 168; 5 Cokes Rep. 27a; Russell's case, Sir W. Jones 174; Williams v. Casey, 4 Mod. 403; Burwick v. Andrew, 2 2 Ld. & Raym. 973; 1 Salk. 314; Palgrave v. Findham, 1 Str. 212; See also 2 Bac. Alr. 445; Rutland v. Rutland, Cro. Eliz. 377; Emerson v. Emerson, 1 Vent. 187.

[22] Carey v. Berkshire R. Co., 1 Cush. 475; Eden v. Lexington, etc. R. Co., 14 B. Mon. 204; Conn. Mutual Ins. Co. v. N. Y. & N. H. R. Co., 25 Conn. 265; Hubgh v. N. O. R. Co., 6 La. Ann. 495; Worley v. C. H. & D. R. Co., 1 Handy 481; Palfrey v. Portland P. S. & P. R. Co., 4 Allen 56; Osborn v. Gellett, L. R. 8 Ex. 88; Hyatt v. Adams, 16 Mich. 180; Richardson v. N. Y. Cent. R. Co., 98 Mass. 89; Nickerson v. Harriman, 38 Me. 279; State v. Railway, 58 Id. 178; Myabb v. Williams, 43 N. H. 102 and cases cited; State v. Manchester & Lawrence R. Co., 52 N. H. 528, 548.

[23] Sedgwick on Damages, 541 n. 7th ed. and cases.

[24] Purple v. Hudson Riv. R, Co., 4 Duer. 74; Hodgman v. West R. Co., 7 How. Pr. 492.

[25] Brooks v. Hanford, 15 Abb. Pr. 342; Crouch v. Girdley, 6 Hill 250; Kellogg v. Schuyler, 2 Denio 73; Lawrence v. Martin, 22 Cal. 173.

both in this country and England, that no suit can be maintained against any executor or administrator in his official capacity, in the courts of any other country, save that from which he derives his authority to act by virtue of the letters thus granted to him.[26] Contracts which the testator has broken in his lifetime, will survive against an executor or administrator as well as those which he has a right to sue upon for the benefit of the estate.[27] So also as well actions against the personal representation, as well as those by him, do not survive, which are of a strictly personal nature, except when the breach is complete during the lifetime of the deceased.[28] Thus, contracts for the instruction of apprentices are considered within the line of personal contracts, and end at the death of the instructor,[29] also contracts by authors or writers to prepare works of any kind for the press, because they can only be prepared by the person with whom the contract is made,[30] also contracts to marry. A covenant not to exercise a particular trade was held to be a mere personal agreement not binding upon the executors.[31]

Executors or administrators ought not to hesitate to carry out a contract entered into by the deceased upon the ground that the breach would be to increase the personal estate. For instance when the intestate entered into a contract for a house to be built on his land but before it was completed died, it was held that the administrator was warranted in allowing the house to be completed and paying the amount due out of the personal estate.[32] An executor will not be held liable for a debt contracted by his testator before he became of age, when it does not appear that the contract was for necessaries, or to have been confirmed by the deceased after he became of age, even though the will directs that all just debts shall be paid.[33] But where the contract was for necessaries the rule is different. Thus the executor of a lunatic was held liable for necessaries furnished his testator while *non compos mentis* before a commission issued and after the issuing of a commission, and before the appointment of a committee.[34] The law commits the personal estate to the administrator upon an express trust and under the supposition that he will pay every creditor his due.[35]

Torts.—As we have before seen torts do not survive either in favor of the executor or administrator, unless the personal estate is in some way affected, so the rule is substantially the same in actions against him. The rule has been stated by Lord Mansfield in the following language. "It is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, then the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But when besides the crime, property is acquired which benefits the testator, then an action for the value of the property shall survive against the executor, as for instance, the executor shall not be chargeable for the injury done by his testator,in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall."[36]

So in general no action in form *ex delicto* as trover,[37] could at common law be maintained against an executor, for any injury to personal property, committed by his testator.[38]

But now in England, the statute, 3 & 4, W. IV., c. 42, sec. 2, authorizes an action of trespass, or trespass on the case, for an injury committed by the deceased in respect to property, real or personal, of another. Provisions of a similar purport obtain by statute in nearly all the States. As to injuries to the person, the rule as we have seen is that the action dies with the party who received or

[26] Bond v. Graham, 1 Hare, 482; Vuneily v. Beatty, 6 Barb. 429; Smith v. Webb, 1 Id. 231; Leonard v. Putnam, 51 N. H. 247; Jackson v. Johnson, 31 Ga. 511; Silver v. Stein, 9 E. L. & Eq. 216; Swearinger v. Morris, 14 Ohio St. 429; Ball v. Nichols, 38 Ala. 678; Gilman v. Gilman, 54 Me. 453.

[27] Wheatly v. Lane, 1 Saund. 216 note.

[28] McGill v. McGill, 2 Metcf. (Ky.) 258; Dickinson v. Calahan, 19 Pa. St. 227.

[29] Baxter v. Benfield, 1 Stra. 1266; Comw. v. King, 4 Serg. & R. 109.

[30] Marshall v. Broadhurst, 1 Tyrwh. 348.

[31] Cooke v. Colcraft, 2 Wm. Blackstone 856; See also Wentworth v. Cock, 2 P. & D. 251; Bally v. Wells, 3 Mills 29.

[32] Cooper v. Jarman, 12 Jurist (N. S.) 956; See Duff v. Gardner, 7 Lans. 160; Orams Estate, 9 Phil. (Penn.) 358.

[33] Smith v. Nayo, 9 Mass. 62.

[34] LaRue v. Gilkyson, 4 Penn. St. 375; See Baxter v. Earl of Portsmouth, 2 Car. & P. 178.

[35] McClintock's Ap. 29 Pa. St. 360.

[36] Hambley v. Trott, 1 Cowp. 371.

[37] Jarvis v. Rogers, 15 Mass. 398; Hench v. Metzer, 6 Serg. & R. 272; Harris v. Crenshaw, 3 Rand. (Va.) 14.

[38] Hambley v. Trott, 1 Cowp. 371; 1 Saund. 216; (a) note.

committed the injury, unless statutes alter the doctrine which prevailed at common law. It is simply necessary then to ascertain what torts are injuries to the person only, and what contracts are purely personal, to determine that an action does not survive generally, whether it be by or against the personal representation. ADDISON G. MCLEAN.

Detroit, Mich.

STIPULATIONS TO PAY EXCHANGE IN NEGOTIABLE PAPER.

The commercial life of a negotiable instrument, may be said to begin with its execution and delivery, and to end at its maturity. During this period it circulates among business men as an instrument of commerce. It is then a substitute for money, and, if the credit of its makers or indorsers is high, it is accepted almost as readily as cash. Being a substitute for money, it is essential that it be for a specific sum. The amount of it must be certain, in order that holders may know the precise sum they are entitled to demand and receive. The rule that a negotiable instrument shall be for an amount certain, is a part of the Code Napoleon in France. In England and America, it is evidenced by many adjudications. It is in fact a part of the mercantile law of the world. It has been applied in many instances.

Thus a written promise to pay a specific sum of money, "and all fines, according to to rule," is not a negotiable promissory note.[1] Neither is a written promise to pay a specific sum and "the value of four days labor."[2] Nor is a promise to pay a specific sum "and also such additional premium as may become due on said policy, (of insurance) in fourteen months from this date with interest after."[3]

The following written promises have also been held not to be negotiable promissory notes: "To pay $1,000 or what might be due after deducting all advances and expenses."[4] To pay certain sums in instalment, a part "to go as a set off for an order of R. to G. and the remainder of his debt from C D to him."[5] To pay a specific sum "first deducting thereout any interest or money J S might owe the maker on any account."[6] To pay a certain sum and "the demands of the sick club at H, in part of interest and the remaining stock and interest to be paid on demand."[7] To pay a specific sum "and also all other sums which may be due to him."[8]

An action was brought upon the following instrument: "West Union, May 4th, 1857. Forty days after date I promise to pay S. S. Green, or bearer, the sum of one hundred dollars, value received, said sum being money due for building my flouring mill at Auburn, Fayette county, Iowa, with six per cent. interest. This note being subject to diminution by any excess in certain bills of hardware allowed by me to S. S. Green, over the original bills as forwarded by J. H. Knight. James Austin." This was held to be a promissory note for a sum certain and due absolutely, and that it was for the defendant, the maker, to show any deduction that should be made, failing in which plaintiff was entitled to judgment.[9]

But in this case the action was between the two principals to the instrument which had never been negotiated. There was no question of negotiability raised, and the case really decides merely that the instrument was a valid and enforceable contract, as between the original parties to it. It would be such a contract even if it were not negotiable.

An interesting question, and one upon which the authorities are somewhat conflicting, is presented by the insertion in instruments intended to be negotiable, of a provision for the payment, besides principal and interest, of "current rate of exchange." The rate of exchange fluctuates according to the condition of commerce, and consequently the amount of a note or bill payable "with exchange" is uncertain. Is this uncertainty such as to destroy the negotiability of the instrument?

In several cases it is held that "exchange"

1 Avery v. Fearnsides, 4 M. & W. 168.
2 Lowe v. Bliss, 24 Ill. 168.
3 Palmer v. Ward, 6 Gray 340; Dodge v. Emerson, 34 Me. 96.
4 Cushman v. Haynes, 20 Pick. 132.
5 Davies v. Wilkinson, 10 A. & E. 98; Clarke v. Percival. 2 B. & Ad. 660.
6 Barlow v. Broadhurst, 4 Moore 471.
7 Bolton v. Dugdale, 4 B. & Ad. 619.
8 Smith v. Nightingale, 2 Stark. 376.
9 Green v. Austin, 7 Iowa 521.

in a promissory note refers to the cost of the transfer of the funds necessary to pay it, and that where a note is payable, "with current rate of exchange" at the place where it was drawn, there is no transfer or transmission of the funds to pay it, and hence no exchange therefore the words "with current rate of exchange," are held to be a mere surplusage and not to affect the negotiability of the instrument.[10]

This appears reasonable enough. But suppose the note or bill is payable at some place other than that in which it was drawn, and to which a transmission of funds is necessary. Does a stipulation to pay current exchange then destroy the negotiability of the instrument? A number of decisions say that it does destroy the negotiability of the instrument.[11] Other cases hold differently. Thus in Wisconsin, judgment was given upon demurrer to a complaint upon a written promise to pay a specific sum "with exchange on New York." The court said "no doubt such instruments have everywhere been treated as commercial paper, both by the business world and by the courts," and that "even if they were not, strictly speaking, promissory notes, there can be no question that they are contracts for the payment of money."[12] This decision simply amounts to holding that such an instrument is probably a negotiable promissory note, and certainly a contract to pay money, even if it be held not negotiable. But in Michigan it has been directly and positively decided that a written promise to pay a specific sum "with current exchange on New York," is a negotiable promissory note. "Is this fluctuation to which exchange is subject, such a contingency or uncertainty as the rule requiring a note to be for a sum certain was intended to guard against? We think not. Bills of exchange and promissory notes are commercial instruments, and to facilitate commerce, are subject to certain rules of law not applicable to other contracts. These rules should be liberally construed, and in such a way as to effect the object had in view. Exchange is an incident to bills for the transmission of money from one place to another. Its nature and effect are well understood in the commercial world; and merchants having occasion to use their funds at their place of business, sometimes make the currency at that point the standard of payments made to them by their customers at a different point. Such is the design of the instrument before us; and we believe such instruments are considered by commercial men to be promissory notes."[13] So a written promise to pay a specific sum "in exchange," was held to be a promissory note by the United States Circuit Court in Illinois. Said Drummond, J.: "An instrument of writing by which A at Chicago promised to pay B within a certain time, $1,000, with the current rate of exchange at New York, at maturity, is a promissory note, notwithstanding the rate of exchange was not specified. I admit that under the general law, a note must be payable absolutely in money. In the example given, a thousand dollars was the sum payable; the exchange, like interest, was an incident merely to the principal sum, and it was not the less on that account an agreement to pay a fixed sum. If a note be executed in England, payable 'with interest,' and a suit be brought on it here, the amount of the verdict or judgment is not a mere matter of computation, but proof must be introduced of the rate of interest in England, and the amount of the verdict or judgment, even after the proof is made, is greater or less, depending upon the fact whether the verdict is rendered to-day, next week or next year, the amount of interest increasing regularly by afflux of time; but when the proof is in, and the time established, then the amount becomes a matter of computation. In the one case, the principal amount and the time and rate fixed by evidence control and determine the aggregate sum, and equally so in the other. If this suit were brought in the courts of this State (Illinois), being a note payable in New York, the amount for which judgment would be rendered would have been ascertained, not from the face of the note itself, but by evidence before the court or jury of the law of New York as to interest. It

[10] Hill v. Todd, 29 Ill. 101; Clauser v. Stone, 29 Ill. 114; Bullock v. Taylor, 39 Mich. 139; See, however, Avery v. Fearnsides, 4 M. & W. 168; Dodge v. Emerson, 34 Me. 96.

[11] Read v. McNulty, 12 Rich. (S. C.) 445; Lowe v. Bliss, 24 Ill. 170; Philadelphia Bank v. Newkirk, 2 Miles (Pa.), 442; Palmer v. Fahnestock, 9 U. C. C. P. 172; Russell v. Russell, 1 McArthur, D. C., 263.

[12] Leggett v. Jones, 10 Wis. 34.

[13] Per Manning, J., in Smith v. Kendall, 9 Mich. 242; Campbell, J., dissenting.

would be only when that was done that the amount could become matter of computation."[14]

The effect of holding that such a stipulation destroys the negotiability of the note or bill, is to deprive indorsers of the right to recover upon it by suit in their own names; but it would seem that they may recover upon it in an action brought in the name of the payee, drawer or drawee, for the use of the indorsee. The insertion of the provision certainly does not make the contract not enforceable as between the original parties to it. The payee or drawee may sue upon it and recover, even although it be held a non-negotiable instrument, and their indorsees should have the use of their names for the purpose of bringing suit upon it.

ADELBERT HAMILTON.

Chicago, Ill.

[14] Bradley v. Lill, 4 Biss. 473. See also, Grutacap v. Woolluise, 2 McLean, 581. And this certainly appears to be the most reasonable view to take of the question. The amount of exchange is always small. Measured by the amount, the uncertainty in the note ought to be held too small to be noticed by the law.

EQUITY— DEED OF TRUST — RELEASE — TRANSFER OF NOTE.

WILLIAMS v. JACKSON; JACKSON v. STICKNEY.

United States Supreme Court, April 15, 1883.

Where a note secured by deed of trust is negotiated, and before the note is paid or becomes payable a release, reciting that it has been paid is made to the grantor by the trustees and the payee of the note, and recorded, and the grantor executed a second deed of trust and note to another person who had notice that the first note had been negotiated, and was unpaid, and who required and was furnished an abstract of title showing that the three deeds were recorded and free from incumbrance before he would make the loan, it was *held*, that the legal title was in the trustee under the second deed of trust, and that the note secured thereby was entitled to priority of payment out of the land.

Appeals from the Supreme Court of the District of Columbia.

W. A. Maury, *P. Phillips* and *W. H. Phillips*, for plaintiff; *Jas. S. Edwards* and *Job Barnard*, for Jackson; *John F. Hanna* and *Jas. M. Johnston*, for Stickney.

GRAY, J., delivered the opinion of the court:

This is a bill in equity, filed by Benjamin L. Jackson and others, partners under the name of Jackson, Brother & Co., and heard on the pleadings and proofs, by which the material facts appear to be as follows:

On the first of January, 1875, Edwin J. Sweet and his wife purchased and took a deed from Augustus Davis of a house and land in Washington, and executed and acknowledged a trust deed thereof, in which they recited that they were indebted to Augustus Davis in the sum of $8.000 for deferred payments of the purchase-money, for which they had given him their four promissory notes of the same date, and payable to his order, —three for the sum of $1,833.33 each, and payable in one, two, and three years respectively, and one for the sum of $2,500, payable in three years, and all bearing interest at 8 per cent.,—and by which deed, in order to secure the payment of those notes as they matured, they conveyed the land to Charles T. Davis and William Stickney, and the survivor of them, their and his heirs and assigns, in trust to permit the grantors to occupy the premises until default in payment of principal or interest of the notes; and upon the full payment of all the notes and interest, and all proper costs, charges and commissions, to release and convey the premises to Mrs. Sweet, her heirs and assigns, with a power of sale upon default of payment, and a provision that the purchaser at the sale should not be bound to see to the application of the purchase-money. That deed of trust was recorded on the fourteenth of January, 1875. The notes secured by that deed were indorsed by Augustus Davis and Charles T. Davis, had on the margin the printed words: "Secured by deed of trust," and were, soon after their date, transferred by the indorsers for full value and before maturity to the plaintiffs, and have since been held by them, except the one due at the end of the first year, which was paid by the indorsers. Charles T. Davis was a son and a partner of Augustus Davis, and was a broker and real estate agent.

On the fifteenth of September, 1876, before any of the other notes fell due, and without the plaintiff's knowledge, the trustees, Davis and Stickney, executed a deed of release of the land to Mrs. Sweet, reciting that the debt secured by the trust deed had been fully paid and discharged, as appeared by the signature of Augustus Davis, who joined in the execution of the release.

At or before the same time, Sweet and wife employed Charles T. Davis to make some arrangement by which they could take up those notes and give others running for a longer time. He went to Samuel T. Williams, and offered him the land unincumbered, as security for a loan of $5,000, payable in four years, and bearing 9 per cent. interest; and Williams agreed to make the loan if satisfied by a conveyancer's abstract of title that the land was free of all incumbrance, but not otherwise.

On the twenty-seventh of September, 1876, a deed of trust, containing provisions like those in the first deed of trust, was executed by Sweet and wife to Robert K. Elliott and Charles T. Davis, to

secure the payment of a note for $5,000 in four years to Williams, with interest at the rate of 9 per cent. On the twenty-eighth of September, the deed of release and the second deed of trust were recorded. Charles T. Davis furnished Williams with certificates of a conveyancer that he had examined the title on the fourteenth of September and found it good, subject to the first trust deed, and again on the twenty-eighth, when the only changes were the release and the second deed of trust; and Williams thereupon gave to Davis his check, payable to Davis' order, for $5,000 (which Davis applied to his own use), and received from him the note of Sweet and wife for the same amount, and the trust deed to secure its payment. Neither Williams nor Sweet and wife then knew that, at the time of the execution of the release, Augustus Davis was not the holder of the notes secured by the first trust deed. On the twenty-ninth of September, Sweet and wife executed another trust deed to Charles T. Davis to secure the payment of six promissory notes to Augustus Davis for $530.26 each, payable at intervals of six months from their date.

On the twenty-seventh of July, 1877, the interest due on the note to Williams not having been paid, the trustees, Elliott and Davis, sold the land by auction for the sum of $6,325 to Eli S. Blackwood, who paid them $1,325 in cash (which was applied to the payment of the interest and other charges), and gave them his note for $5,000, secured by a trust deed of the land.

The bill, which was against Williams, Sweet and wife, Augustus Davis and Blackwood in their own right, against Charles T. Davis and Stickney in their own right and as trustees, and against Elliott as trustee only, prayed that the release by Stickney and Charles T. Davis, as well as all the subsequent conveyances, might be declared void as against the first trust deed, and the trust created by that deed be declared to have priority over all subsequent incumbrances; that Charles T. Davis be removed from his trust and a new trustee be appointed in his stead; that the land be sold and the proceeds applied, under order of the court, to the payment of the notes held by the plaintiffs and of any other lawful claims; and for an injunction, a discovery, an account and further relief.

The judge before whom the case was first heard, made a decree declining to set aside the release or to declare that the first deed of trust had priority over the second; adjudging that the first deed of trust was fraudulently and negligently released by Augustus Davis and Charles T. Davis, and wrongfully and negligently released by Stickney, and therefore ordering that the plaintiffs recover against Augustus Davis, Charles T. Davis, Stickney and Sweet and wife, the amount due on the notes held by them, with interest; declaring that the note for $5,000, held by Williams, was the first charge on the land; and ordering the land to be sold and the proceeds to be distributed in paying off the incumbrances in the order thus established.

The court at general term reversed those parts of the decree which declined to set aside the release, and which declared that Williams was entitled to priority; and also that part which adjudged that the plaintiffs recover against Stickney the amount of their debt; affirmed it in other respects, and ordered the proceeds to be first applied to the payment of the plaintiffs' debt. Williams appealed from so much of this decree as gave priority to the plaintiffs' claim; and the plaintiffs appealed from so much as reversed the decree against Stickney.

By the statutes regulating the conveyance of real estate in the District of Columbia, all deeds of trust and mortgages, duly acknowledged, take effect and are valid, as to all subsequent purchasers for valuable consideration without notice, and as to all creditors, from the time of their delivery to the recorder for record; whereas other deeds, covenants, and agreements take effect and are valid, as to all persons, from the time of their acknowledgment, if delivered for record within six months after their execution. Any title-bond or other written contract in relation to land may be acknowledged and recorded in the same manner as deeds of conveyance; and the acknowledgment duly certified, and the delivery for record, of such bond or contract, shall be taken and held to be notice of its existence to all subsequent purchasers. Rev. St. D. C. secs. 446, 447, 449.

The first deed of trust from Sweet and wife did not give the trustees merely a power to release the land on payment of the notes secured thereby and to sell on default of payment; but it vested the legal title in them. A release of the land before payment of the notes would be a breach of their trust, and would be unavailing in equity to any one who had knowledge of that breach. Ins. Co. v. Eldredge, 102 U. S. 545. But it would pass legal title. Taylor v. King, 6 Munf. 358; Canoy v. Troutman, 7 Ired. 155. The legal title in the land, being in the trustees under the first deed of trust, passed by their deed of release to Mrs. Sweet, and from her by the second deed of trust to the trustees for Williams.

The first deed of trust having been made to the trustees therein named for the benefit of Augustus Davis, and to secure the payment of the notes from the grantors to him, and the plaintiffs, upon the transfer and indorsement to them of those notes, having taken no precaution to obtain and put on record an assignment of his rights in such form as would be notice to all the world, the recorded deed of release, executed by him as well as by the trustees, reciting that the notes had been paid, and conveying the legal title, bound the plaintiffs, as well as himself, in favor of any one acting upon the faith of the record and ignorant of the real state of facts. If the plaintiffs wished to affect subsequent purchasers with notice of their rights, they should have obtained a new conveyance or agreement, duly acknowl-

edged and recorded, in the form either of a deed from the original grantors, or of a declaration of trust from the trustees, or of an assignment from Augustus Davis of his equitable interest in the land as security for the payment of the notes. The record not showing that any person other than Augustus Davis had any interest in the notes or in the land as security for their payment, an innocent subsequent purchaser or incumbrancer had the right to assume that the trustees, in executing the release, had acted in accordance with their duty.

Williams is admitted to have had no actual knowledge that the notes secured by the first trust deed were held by the plaintiffs, or that they were unpaid. The knowledge of those facts by Charles T. Davis, through whom Williams made the loan, does not bind him, because upon the evidence Charles T. Davis appears not to have been his agent, but the agent of Sweet and wife. Williams took every reasonable precaution that could have been expected of a prudent man, before advancing his money to Charles T. Davis for Sweet and wife. He declined to lend his money until after he had been furnished with a conveyancer's abstract of title, showing that the deed of release from the trustees under the first deed of trust, and from the original holder of the notes secured thereby, as well as the second deed of trust to secure the payment of the money lent by Williams, had been recorded, and that the land was not subject to any incumbrance prior to the second deed of trust.

It was suggested in argument that as the first deed of trust showed that the notes secured thereby were negotiable and were not yet payable, and that the land was not intended to be released from this trust until all the notes were paid, Williams was negligent in not making further inquiry into the fact whether they were still unpaid. But of whom should he have made inquiry? The trustees under the first deed and the original holder of the notes secured thereby having expressly asserted under their own hands and seals that the notes had been paid, and Sweet and wife having apparently concurred in the assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of that fact; and there was no other person to whom he could apply for information, for he did not know that the notes had ever been negotiated, and he had no reason to suppose that they had not been canceled and destroyed.

To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof or knowledge, fraud or gross or willful negligence on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business. Hine v. Dodd, 2 Atk. 275; Jones v. Smith, 1 Hare, 43, and 1 Phill. 244; Agra Bank v. Barry, Irish R. 6 Eq. 128, and L. R. 7 H. L. 135; Wilson v. Wall, 6 Wall. 83; Norman v. Towne, 130 Mass. 52.

The equity of Williams being at least equal with that of the plaintiffs, the legal title held for Williams must prevail, and he is entitled to priority. The decree appealed from is in this respect erroneous, and must be reversed. But that decree, so far as it refuses relief against Stickney personally, is right. The main purpose of the bill is to set aside the deed of release and to satisfy the plaintiffs' debt out of the land. The attempt to charge Stickney with the amount of that debt, by reason of his negligence in executing the release is wholly inconsistent with this. The one treats the release as void, the other assumes that it is valid. In the one view Stickney is made a party in his capacity of trustee only; in the other, it is sought to charge him personally. The joinder of claims so distinct in character and in relief is unprecedented and inconvenient. Shields v. Barrow, 17 How. 130, 144; Walker v. Powers, 104 U. S. 245.

The result is that the decree appealed from must be reversed, and the case remanded, with directions to enter a decree in conformity with this opinion, and without prejudice to an action at law or suit in equity against Stickney.

Decree reversed.

HARLAN, J., did not sit in this case, and took no part in the decision.

NEGLIGENCE—CHILDREN ON STREET CARS.

HESTONVILLE, ETC. R. CO v. KELLEY.

Supreme Court of Pennsylvania, February 12, 1883.

Two boys, the youngest of whom was seven years of age, were about to jump on the back platform of a street car when the driver called to the elder one, and asked him to turn a switch some distance ahead. Both boys then jumped on the front platform, and the elder passing behind the driver, jumped off, ran ahead, and turned the switch. Some thirty seconds elapsed before the car passed the switch, during which time the driver remained bent over the dasher, as was his duty, watching to see that the switch was properly turned. The younger boy remained during this time on the front platform unnoticed by the driver. Just as the car passed the switch the driver straightened up, and at the same moment the younger boy, whose hat had been blown off by the wind, jumped after it from the platform, in so doing he fell under the wheels and was killed. There was no evidence to show that the driver knew that the boy had remained on the car until he felt the wheels passing over the boy's body. In an action by the boy's parents against the railroad company to recover damages for his death: *Held*, that there was no evidence of negligence on the part of the company defendant to go to the jury, and that said defendant was therefore entitled to judgment.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Patrick Kelley and Mary, his wife, against the Hestonville, Mantua & Fairmount Passenger Railroad Company, to recover damages for the death of their son, run over and killed by one of defendant's cars on September 26, 1880.

On the trial, before Thayer, P. J., the following facts appeared: On the evening of September 26, 1880, about seven o'clock, as car No. 64 of the defendant's line was approaching the terminus of its road on Belmont Avenue, two boys, John L. Knight, aged twelve years, and Frank Kelley, aged seven, were about to jump on at the rear platform. About half a square ahead of the point where the car then was, there was a switch, which it was the duty of the conductor to turn. The driver was leaning over the dasher watching for the switch, and called to Knight, the elder of the two boys, "Boy, will you come and turn the switch?" Both boys thereupon jumped upon the front platform, and Knight crossed over behind the driver and ran ahead to turn the switch. The distance from the point where Knight ran ahead to the switch was about one-fourth of a square. Knight waited until the car had crossed the switch and again got on. Just at this moment Kelley, who had remained upon the car, jumped off to pick up his hat, which the wind had carried away, when his foot slipped and he fell under the car, was run over and killed. All other material facts appear in the opinion of the court.

The defendant requested the court to charge, *inter alia*, as follows: "8. Under all the evidence the verdict should be for the defendant." Ans. Refused.

Verdict and judgment for the plaintiffs in the sum of $2,500, whereupon defendapt took this writ, assigning for error, *inter alia*, the answer to the point cited above.

Samuel Gustine Thompson, for plaintiff in error; *Frank Wolfe* and *Lewis Stover*, for defendant in error.

GREEN, J., delivered the opinion of the court:

After a very careful consideration of the testimony in this cause, we are unable to discover any evidence of negligence on the part of the defendant productive of the injury in respect of which the suit is brought. The only testimony upon which it is possible to found an allegation of negligence, is that of the boy Knight, who was the companion of the deceased at the time of the accident. But that testimony, in our judgment, fails to establish the ingredients necessary to an accusation of negligence against the defendant. It fails to prove that the driver asked or permitted the deceased to get upon the car, or that he knew of his presence there. The boy said, on cross-examination, that he had before testified that the driver addressed him (Knight) saying: "Boy, will you come and turn switch?" and he said nothing contradictory of this in his examination in chief. He does not say that either of them was asked to ride on the front platform or to ride on the car at all. He does testiy that he jumped on the front platform, and that deceased jumped on next after him. He does not say that the driver either spoke to or saw the deceased, or in any other manner had knowledge of his presence. He testifies that he rode about a fourth of a square, jumped off, turned the switch, jumped on again, and then Kelley's hat blew off, and he (Kelley) jumped after it, but slipped under the car-wheels, which ran over him and killed him. To drive a horse-car the length of one-fourth of a square would necessarily occupy but the fraction of a minute. A rigid examination of Knight's testimony, which was very brief, develops no consciousness on the driver's part of the presence of Kelley on the platform. In order to learn how that fact was, it is necessary to resort to other testimony. But there is no testimony on that subject in the case, except that of the driver himself. He says: "When I was coming up to the switch I was leaning over the car, the front dasher, looking out for the switch. I was going very slow when three boys jumped on, on my left hand side; the biggest one of the three run right behind me, and right up to the switch and turned it, and sang out, 'all right.' I straightened up then, and looked around to the other two boys, and they were gone. I went some distance, and I felt a jar of one wheel, and heard somebody say that the car had run over a boy." Further on he says: "I did not see the boys until they jumped on the car. When the boy jumped on the car, he said something. He said he would turn the switch, and I judge I said something. I am not quite sure, but I think I said, 'go ahead.' I did not speak to the other boys; I hadn't time. They were on about half a minute. After the boy that turned the switch said "all right, I straightened up, and the boys were gone." He also said: "I leaned over, not because I saw a couple of boys, but on account of the switch." There is nothing contradictory of this in the testimony of Knight, except as to the number of the boys which was not material. When the boys jumped on, the driver, who was at his post, was leaning over the dasher, looking out for the switch. He was in the strict performance of his duty. When that duty was accomplished, he turned to look for the boys and they were gone. He was certainly bound to look out for the switch, and not to desist until he had safely passed it. Had he so desisted from the performance of this duty in order to eject the boys, and an accident had happened in consequence, he would have justly been chargeable with negligence. While it is true he was bound to put off the boys, regard must be had to the circumstances in which he was placed at the moment that duty became incumbent upon him. According to the uncontradicted testimony, the whole interval of time, that the boys were on the car, did not exceed thirty seconds. In that space, and with the driver's attention otherwise properly engaged, it is not just or reasonaible to hold him guilty of negligence as for a permissive riding upon the front platform. In no other respect is there the slight-

est ground for a charge of negligence. The car was properly constructed, the boy was not crowded or jolted off, his death was not the result of any act of the defendant or its agents, but it resulted solely from his own voluntary, unauthorized, and unnecessary act of jumping from the car while in motion. While so young a child is not responsible for contributory negligence, still there can be no recovery except for negligence on the part of the defendant, and this we fail to find in view of the circumstances attending the occurrence. The case is peculiar, and differs from all that have heretofore been considered by this court. It more nearly resembles the case of Hestonville Pass. R. Co. v. Connell, 7 Norr. 520, than any others. There the child was injured in endeavoring to get upon the front platform of the car, but was not seen by the driver who was engaged on the rear platform at the time. On p. 523, Mr. Justice Gordon says: "The accident here complained of could not have happened but by the direct act of the plaintiff in his sudden and improper attempt to board the car, and this when the car was moving slowly, and when the driver had no reason to anticipate danger to any one young or old." In Pittsburgh, etc. R. Co. v. Caldwell, 24 P. F. S. 421, the evidence of a continuous permissive riding upon the front platform was clear and undisputed by the driver himself, and the decision of the case was put upon that ground.

In Phila. City Pass. Railway Co. v. Hassard, 25 P. F. S. 367, the facts were that the boy, who was almost ten years old, was a passenger, and attempted to get off the rear platform, but did not succeed, owing to the crowded condition of the car, and he then went to the front platform and got off there. There were several persons on the front platform, and it was testified that the driver was asked by the boy to stop, that the driver slackened up, but did not stop, and it was left to the jury to say whether there was negligence on the part of the company. This action of the court below was assigned for error, and affirmed by this court. What was said as to the duty of the defendant to prevent children from riding upon, or getting off from the front platform, was said with reference to the facts of the case, but all that was decided was, that it was the province of the jury to determine the question of negligence in view of all the circumstances. The driver was perfectly conscious of the boy's presence on the platform, and his attempt to get off, and he made no effort to prevent him. But here, as we have seen, the facts were very different. Where the sole basis of liability is the omission to perform a certain duty, suddenly and unexpectedly arising, we think there ought to be at least a consciousness of the facts which raise the duty on the part of the person who is charged with its performance and a reasonable opportunity to discharge it.

Upon the whole testimony in this case we think there was no proof of negligence on the part of the defendant, and that the eighth point of the defendant should have been affirmed.

Judgment reversed.

CORPORATION — PAID UP STOCK — CREDITORS' RIGHTS.

LOUISA COUNTY NAT. BANK v. TRAER.

Supreme Court of Iowa, June 12, 1883.

Where a corporation, in order to liquidate an indebtedness which it can not pay in cash, issues paid-up stock to its creditors in good faith, at twenty per cent of its face value, such creditors, thus becoming stockholders, take such stock as paid-up stock, and are not liable upon the insolvency of the company, as stockholders holding unpaid shares.

Appeal from Linn Circuit Court.

These cases are alike in all material respects, and are submitted upon one set of abstracts and arguments. The matter in controversy is this: The road of the Burlington, etc. R. Co. was built by a construction company of which John. W. Traer and George Greene (the latter being now deceased) were members and stockholders. Both of these companies were duly incorporated under the laws of this State. Upon a final settlement made in March, 1872, and after the completion of the work, the railroad company was found to be indebted to the construction company in the sum of $70,000, which, under its contract, it was bound to pay in money. It did not have the money to make the payment, and it was agreed that the construction company should take $350,000 of the stock of the railroad company in payment of the debt of $70,000, and thereupon that amount of stock was issued to the construction company, and distributed among its members. Of this stock George Greene received 910 shares of $100 each, and John W. Traer received 140 shares of $100 each.

In 1874 there arose certain claims against the railroad company in favor of the plaintiff Jackson and one Spofford and one Cosgo for supplies furnished to the road between January 1, 1874, and May 11 of the same year. The Burlington, etc. R. Co. gave to said parties its promissory notes for the amount of said claims. These notes were afterwards renewed, and Spofford and Cosgo transferred the notes held by them to the Louisa County National Bank, plaintiff herein.

On May 19, 1875, the Burlington, etc. R. Co., being hopelessly insolvent, at the instance of its mortgage bondholders, a receiver was appointed, who took possession of all its property for the benefit of its creditors, and afterwards its road was sold under a decree of foreclosure, and the purchasers organized a new company under the name of the Burlington, Cedar Rapids and Northern Railway company. Pending this litigation, which was in the circuit court of the United

States, the plaintiff Jackson, and said Spofford and Cosgo, presented their claims to the United States court for allowance and payment, and the claims were not entertained by the court. They did not further pursue their rights in that direction, but Spofford and Cosgo transferred their notes to the Louisa County Bank, and the bank and Jackson each commenced suits upon the notes held by them in the district court of Linn county, against the Burlington, Cedar Rapids & Minnesota Railroad Company, and on the twentieth day of October, 1877, judgments were entered in said court against said company for the full amount of said claims. Executions were issued on said judgments, and a demand was made of the officers of the company for property on which to levy said executions, and no property was produced or found.

After these judgments were rendered, and after the organization of the Burlington, Cedar Rapids & Northern Company, that company issued to Jackson, Cosgo and Spofford certain shares of stock in said company, which was stipulated in writing to be a compromise of any claim they might have against said new company, based upon said judgments. It was further provided in said written stipulation, that the transfer of said stock should not operate as a waiver of any right or claim of said parties against the old company or its stockholders.

The actions at law were commenced to recover judgments against the defendants George Greene and John W. Traer for the amount of the judgments against the Burlington, Cedar Rapids & Minnesota Railroad Company, upon the claim that because they received the said shares of stock in liquidation of the debt of the company at twenty cents on the dollar, they were and are stockholders of unpaid stock, and therefore liable for the amount unpaid to the creditors of the company. There was a trial to the court, and judgments were rendered for the plaintiffs for the difference between the face value of the stock received by Jackson and Cosgo and Spofford from the Burlington, Cedar Rapids & Northern Company, and the amount of the judgments. Both parties appeal.

P. Henry Smythe & Son and *S. L. Glasgow*, for plaintiff; *Hubbard, Clark & Dawley*, for defendants.

ROTHROCK, J., delivered the opinion of the court:

1. There are facts in the record, other than those above stated, which, in the view we take of the case, are not necessary to be referred to. It should be stated that George Greene died pending the action against him, and that William Greene, administrator, was substituted as defendant.

The main question in the case, and that which, in our judgment, determines the rights of the parties, is, were the defendants, under the facts above disclosed, at any time liable as stockholders for unpaid stock of which they were the owners? In other words, were they liable for the face value of the stock, or had they the right to receive from the corporation, in payment of a cash indebtedness, stock at less rate than its face or par value? The circuit court held that they were liable to the plaintiff, but it was also held that the same rule must be applied to the plaintiffs which they invoke against the defendant, and that is, that they had no right to take the stock of the Burlington, Cedar Rapids and Northern Company in payment of their judgments at less than its par value. This must have been the view of the court, because it appeared that the stock so taken was worth at the time but from twenty to thirty cents on the dollar. Something is said in argument to the effect that Spofford and Cosgo, by receiving the stock last above mentioned, could not bind the Louisa County Bank, because the bank was the judgment plaintiff. But it appears in the record that the bank knew of the transaction and made no objection thereto, and we think the court may fairly have found that this amounted to a ratification of the acts of Spofford and Cosgo by the bank. As we understand the position of counsel for plaintiffs, they concede that a corporation may, as between itself and one to whom it is indebted, make a valid disposition of its stock, and issue full-paid certificates of stock for such consideration as may be agreed upon by the contracting parties. But it is claimed this can not be done to the prejudice of the creditors of the corporation, and it is urged that the mere showing that the stock held by defendants was issued to them in payment of a debt due them at the rate of twenty cents on the dollar, renders the defendants liable to the creditors for the remaining eighty cents on the dollar. On the other hand, it is contended by counsel for defendants, that in the absence of fraud, such a transaction is valid between the parties, and, if entered into in good faith, can not be impeached by creditors of the corporation.

In the case of Phelan v. Hazard, U. S. C. C., E. D. Mo., 6 Cent. L. J. 109, certain parties were the owners of a tract of land supposed to be mining property. The land was incumbered by certain mortgages. Rowland G. Hazard, one of the owners, was the holder of one of these mortgages. Articles of incorporation were adopted by the owners, and the property was conveyed to the corporation, for which it issued to the owners certain shares of full-paid stock. Rowland G. Hazard afterwards transferred his stock to the defendant. Afterwards the corporation made its promissory notes to the plaintiff's assignor, and the action was brought to recover the amount due on the promissory notes, upon the ground that the stock had never been paid for, and defendant, under the statutes of Missouri, was liable for the plaintiff's debt to the extent of the par value of the stock. The answer denied that the shares had not been paid up in full; and averred that the record and books of the company showed that they were fully paid, on the faith of which de-

fendant purchased the stock. It appears that under the statute of Missouri, a creditor of a corporation may maintain an action against a stockholder after a dissolution of the corporation. It was not charged in that case that there was any fraud in the original transaction. It was held that unless the transaction is impeached for fraud it is valid, and that this can not be done unless the attack is directly made. The court said: "The cases are numerous wherein such transactions as that which was entered into in this instance between the owners of the mining property and the corporation which they formed have come before the court, and, in the absence of fraud, have been sustained." It is further said: "The following proposition is fully sustained by the authorities: That the contract is valid and binding upon the corporation and the original share takers, unless it is rescinded or set aside for fraud; and that while the contract stands unimpeached, the courts, even where the rights of creditors are involved, will treat *that* as payment which the parties have agreed should be payment."

In the case of New Albany v. Burke, 11 Wall. 96, a city subscribed to the capital stock of a corporation, payment therefor to be made in bonds of the city. A part of the bonds were delivered to the corporation, and afterwards, by an agreement between the corporation and the city, the bonds were surrendered and the stock subscription was canceled. The action was brought against the city by a creditor of the corporation in which it was alleged that the settlement and compromise between the city and the corporation was illegal. It was held that as both the city and the corporation acted in entire good faith, and did that which under the facts of the case was for the interest of both, no recovery could be had of the city.

It is a general principle well established by authority that the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, and any release of payment in full for stock subscribed is ordinarily a fraud upon the creditor of the corporation. While this is the rule, it is apparent that it can have no application to a case where it is shown that the transaction complained of is untainted with fraud, and entered into and carried out in good faith by the contracting parties, and without prejudice to creditors.

The case of Osgood v. King, 42 Iowa 478, is relied upon by counsel for plaintiff as sustaining the right of recovery in this case. In that case it was charged in the petition that certain parties, including the defendant, organized and incorporated a coal company, and that at the time of the incorporation, and before any other party had any interest in said corporation, the said incorporators, including King, the defendant, conveyed certain lands to the corporation and issued to themselves certificates of stock for 1,900 shares of $100 each; that the land conveyed was not worth more than $27,500, and would not make payment of more than $14 per share for the stock issued. Recovery was sought as against the defendant, one of said stockholders. The defendant demurred to the petition, and it was held that the demurrer should have been overruled upon the ground that the transaction, as shown by the averment of the petition, was a gross fraud upon the creditors of the corporation. If the defendant had answered, and upon the trial made it appear that the transaction was entered into in good faith, and that it did not operate as a fraud upon creditors, it is not to be supposed that the ruling would have been different in that case from the authorities above cited.

In the case at bar the defendants answered and a trial was had upon evidence introduced in court from which it appears that the Burlington, Cedar Rapids & Minnesota Railroad Company was hopelessly bankrupt as early as 1871. On the seventh day of February of that year the company adopted a resolution which was in these words: "Resolved, that in the adjustment and liquidation of claims against the company, the treasurer be authorized to use the stock of the company provided not less than 20 per cent. of the par value can be realized for the purpose." The auditor of the railroad company testified as follows: "I am positive that the way the construction company came to receive the 3,500 shares of the stock of the railway company was this: Certain payments were to be made to it in cash, and the shares were given in payment under the resolution referred to. The railway company was entirely unable to pay $70,000 in cash, and the stock had to take the place of the cash payment. They were reluctant to take the stock. The transaction was made at the instance of Judge Green. The stock was not worth anything in the market. The road owed a floating debt of $500,000. We had no way of paying except by its earnings and its stock, and by borrowing. * * *" This testimony is not contradicted and its truth must be conceded. It further appears that the mortgages upon the road were foreclosed, and its property was purchased by the mortgage bondholders and the new company was organized. It is not claimed that the stock in question had at the time it was issued to the defendants, or afterwards, any value whatever, and of course the foreclosure of the mortgage extinguished the stock.

Now, under this state of facts, if we were to hold the defendants liable to the plaintiffs for 80 cents on the dollar of the stock which was issued to them, it would be grossly unjust. This stock was not issued in pursuance of an original stock subscription. It was issued in pursuance of the above resolution entered upon the records of the corporation. These defendants were creditors, and they took stock under that resolution because they could get nothing else. The stock was then worthless, and so remained, and no creditor would have been defrauded if an unlimited amount of it had been issued. The plaintiffs, in effect, demand that because these defendants took this worthless stock they are liable to pay the

debts due from the corporation to other creditors. This would be grossly inequitable, and we know of no rule of law requiring us to so hold. It appears that George Greene was president of the Burlington, Cedar Rapids & Minnesota Railroad Company at the time this stock was issued, and both he and Traer were stockholders and member of the construction company and officers therein. These facts are alluded to in argument. But a stockholder or a director of a corporation may deal with the corporation and the law will protect him as well as any other party. His relation to the corporation goes only to the question of the good faith of the transaction. Smith v. Skeary, 10 Sup. Ct. (Conn.) Rep. 456.

We think that the facts in this case fully rebut the presumption of fraud which attaches in transactions of this kind, and that the court should have rendered a judgment against the plaintiffs for costs. The cause will be affirmed upon plaintiffs' appeal, and upon defendants' appeal it will be reversed.

ADAMS, J., dissenting.

CRIMINAL LAW — PLEA OF GUILTY IN CAPITAL CASE— WITHDRAWAL OF PLEA.

GARDNER v. PEOPLE.

Supreme Court of Illinois, March 29, 1883.

Where a person of immature age, a foreigner, ignorant of the language and institutions of this country, upon being arraigned upon an indictment for a capital offense, says that he is guilty, but says so under circumstances which plainly indicate his ignorance of his rights, it is error for the court, without appointing counsel or submitting the case to a jury, to accept such statement as a plea of guilty and enter judgment and pass sentence of death in pursuance of it. Judicial discretion will not extend to such a case.

Hugh Fullerton, *W. H. Campbell* and *H. R. Nortrup*, for plaintiff in error; *Thomas Mehan*, State's Attorney, for the People.

MR. JUSTICE MULKEY, delivered the opinion o the court.

On the 23d day of November, 1882, Theodore Gardner, a young man between nineteen and twenty years of age, of German nationality, was indicted by the grand jury of Mason county for the murder of Mary Welter, the killing having occurred on the 14th of the same month. At the time of the homicide young Gardner lived in the family of John B. Welter, the husband of the deceased, who was also the uncle of the accused. The prisoner had but a short time before come over from Germany to this country, and was unable to speak or understand the English language. On the 25th, the day following the returning of the indictment into court, the accused, being formally arraigned, plead guilty to the charge, and was duly sentenced by the court to be hanged on the 12th of January, 1883. During this proceeding the accused seems to have been without counsel, or any one to consult or advise with as to what he should do under the trying circumstances. Later in the term,—to-wit, on the 14th of December, 1882,—and while a judge other than the one who tried the cause was presiding, the prisoner, by counsel then appointed for that purpose, made application for leave to withdraw the plea of guilty, which was overruled by the then presiding judge, on the ground he had not tried the case. Under the peculiar circumstances of this case we are of opinion this application should have been allowed, and that it was error to refuse it. Had the accused been a man of mature age, familiar with our language and institutions, and nothing in the record to create a doubt as to whether he fully understood the nature of the charge against him, and the perilous situation in which he was placed, quite a different question would be presented. In such a case, assuming everything had proceeded regularly, we would not feel at liberty to interpose. Within the limits stated it would be a matter within the discretion of the court trying the case.

But in this case, outside the considerations already mentioned, we regard the course adopted by the court in its examination of the accused, with a view of determining whether the plea of guilty should be entered or not, as irregular, and are of opinion that the facts thus elicited, when considered as a whole, in connection with the manner in which they were obtained from the prisoner, did not warrant the court in entering the plea or in pronouncing the sentence of death. It appears that upon the arraignment of the prisoner, H. R. Nortrup, a member of the bar, was, on the suggestion of the State's attorney, appointed by the court an interpreter to read the indictment to the prisoner in German, and explain to him the nature of the charge. Nortrup being sworn as an interpreter, and having read the indictment to the prisoner in German, the following colloquy occurred between him and the court:

Court: "You may read to the prisoner the indictment translated into German. Nortrup: "Do not know that I can readily read to the prisoner the indictment translated in German, on account of the technical phrases and law terms, but I can give him the substance of it. Court: "Very well; you may do so. (Nortrup then explained the indictment to the prisoner.) Nortrup: "I have explained, as best I could, the three counts in the indictment; he says he understands the charge. Court: "You may ask him whether he is guilty or not. Nortrup: "The prisoner says he is guilty. Court: "Ask him if he killed Mary Welter. Nortrup: "He says he did. Court: "Does he understand the nature of the charges against him? Nortrup: "He says he does; but in talking with him I did not explain so fully to him the charges as I could to write it out in German."

The court then ordered the indictment to be

copied and translated into German, which was done by Nortrup. After having made out the copy, and endeavored to explain to the accused, in German, the nature of the charge, as well as he could, Nortrup, under the sanction of an oath, made a report to the court in these words:

"YOUR HONOR—I have given the prisoner a translation of the indictment, and yet it is not literal copy of it; contains the substance of it, but is not a perfect translation of the indictment. I made it up as best I could, and gave him that copy. I have talked with the prisoner in his native tongue, and from the way he answers me, and from the statements he makes, I would suggest, as a friend of the court, that your honor appoint him counsel. I can concede that he will answer so you can enter the plea of guilty, but from the state of his mind, and the way he appears to me in talking with him, I do not believe he understands his situation. I am satisfied he does not understand the relation of things, is wholly unacquainted with our institutions, and does not understand enough to act intelligently during the proceeding. I am satisfied that if the State's attorney had put a count for arson in the indictment, he would plead guilty to that, too, he is that ignorant, and the way he answers me satisfies me that he is not in frame of mind to act for himself."

Under these circumstances, notwithstanding the killing was confessed, we are of opinion it was the duty of the court to at least have appointed the prisoner counsel, and not have entered the plea of guilty without his concurrence. But the more proper course would have been to have entered the plea of not guilty for him, as in the case of one whose sanity is questionable, or of one standing mute, and to have appointed counsel to take charge of his defense.

After some further colloquy between the court and Nortrup, the latter, being impressed with the conviction the prisoner did not fully comprehend the nature of the charge against him, or fully realize his perilous situation, declined to interrogate the prisoner further, or otherwise act as an interpreter; and thereupon the court appointed L. Ringstorff to act as such. A number of questions were then asked the accused, under the direction of the court, eliciting answers admitting the killing, and also that he understood the charge, being substantially the same answers he had given before. After which the following passed between the court and Ringstorff, the interpreter:

Court: "Ask him why he killed her." Interpreter: "He says they quarreled." Court: "What about?" Interpreter: "He says she said he wrote a letter," — interpreter, puzzled, continuing,— "something about his clothes. I can not make out what he means." Court: "Did the woman have any weapons?" Interpreter: "He says not; he says she threatened to shoot him. She said, if I did not leave she would shoot me." Court: "Ask him how he killed her." Interpreter: "He says he grabbed her by the neck in a handkerchief she had around her neck, then he threw her on the floor, and she was dead." Court: "What did he tie the hankerchief around her neck for?" Interpreter: "He says he did not do that," etc.

During this examination of the accused, Ringstorff, referring to the prisoner, remarked to the court: "He talks and acts like a half idiot."

As already indicated, this inquisitorial process to which the prisoner was subjected was irregular and unwarranted. The calling on one to plead to an indictment can not be made the occasion of extracting from him criminating evidence against himself. If, under peculiar circumstances like the present, the court has doubts as to whether the accused understands the nature of the charge, the court, if able to communicate with the prisoner, should explain to him the nature of the charge, as well as the consequences of a plea of guilty; but if, by reason of being unable to speak the language of the prisoner, the court can not do so, it should appoint competent counsel for the accused, to see that the character of the charge and consequences of the plea are fully understood, before accepting such a plea,—and if, after availing itself of all these precautions and safeguards, the court is still in doubt, then, as before suggested, the plea of not guilty should be entered, and the cause submitted to a jury. Under no circumstances ought the court, in such case, to proceed to examine the accused, as seems to have been done here, with a view of determining whether the killing was murder or some other offense. This was, in effect, trying the prisoner by the court, which, of course, is wholly incompatible with the safeguards which the law has thrown around one charged with a capital offense. We have no doubt the accused understood he was charged with the killing of the deceased, and also that he did not wish to deny that fact; yet, at the same time, we think it highly improbable that he understood the difference between a charge of murder and a mere charge of taking life, or that one might be proved guilty of killing another, and yet not be guilty of any offense at all, or at least of the offense of murder. Even admitting the court would be justifiable in entering a plea of guilty upon admissions thus obtained (which we have just seen it would not), it is clear the admission of the accused in this case that he killed the deceased, without a more satisfactory account of the attending circumstances, was not sufficient to authorize the entry of that plea. The killing, as is well understood, standing alone, does not constitute the crime of murder, but, rather, a single link in the chain of testimony to establish that crime.

This case well illustrates the great danger there would be in any system of law that would allow a plea of guilty to be entered up on criminating evidence thus obtained. From the evidence thus extracted from the prisoner, if his statements are all to be relied on, the killing occurred in a quarrel, in which it is evident most of the details are as yet undisclosed; but in the little that does ap-

pear, taking his statement as true, the deceased, pending the quarrel, and as part of it, threatened to shoot him. There may be no truth in this part of his statement, and we do not wish to be understood as intimating any opinion on that subject. But this we do say, that if admissions thus obtained could be used for such a purpose, common justice would say that the prisoner should have the benefit of his statement taken as a whole.

For the error indicated the judgment of the court below is reversed, and the cause remanded, with direction to the circuit court to permit the prisoner to withdraw the plea of guilty and to enter a plea of not guilty, and to proceed with the trial of the cause as in other cases.

Judgment reversed.

WEEKLY DIGEST OF RECENT CASES.

1. APPEAL—BOND—SURETY.

An appeal bond in an ordinary foreclosure suit in the courts of the United States, does not operate as security for the amount of the original decree; nor for the interest accruing thereon pending the appeal; nor for the balance due after applying the proceeds of the mortgaged premises; nor for the rents and profits, or use and detention of the property pending the appeal; but only for the costs of the appeal, and the deterioration or waste of the property, and perhaps burdens accruing upon it by non-payment of taxes, and loss by fire if not properly insured. It is very doubtful whether mere depreciation in market value is any cause of recovery on the bond. Where an appeal bond, instead of following the words of the statute "that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and if he fails to make his plea good, shall answer all damages and costs," super-adds that he shall also "pay for the use and detention of the property covered by the mortgage in controversy during the pendency of appeal;" these words will be rejected, and the bond will be construed as having its ordinary and proper legal effect; the judge taking the bond having no right to require such an addition to the condition of an appeal and *supersedeas*. This case distinguished from those in which official bonds and bonds to the government for the purpose of enjoying some office or privilege have been sustained as contracts at common law. *Omaha Hotel Co. v. Kountze*; *Kountze v. Omaha Hotel Co.*, U. S. S. C., May 7, 1883; 2 S. C. Rep. 911.

2. CONTRACT—SALE—DELIVERY—CONSTRUCTION.

Plaintiff sold to defendant 3,000 bushels of wheat to be delivered at a place twelve miles distant, and to be transported by teams. *Held*, that a single delivery of all the wheat was neither reasonable nor contemplated by the contract, and that refusal to receive, after a part of the grain was delivered, was a waiver of any subsequent offer or tender by the plaintiff. *Roberts v. Mazeppa Mill Co.*, S. C. Minn., May 1883; 15 Ch. Leg. N. 372.

3. DISTRICT OF COLUMBIA — WASHINGTON AND GEORGETOWN R. CO. — REPAVEMENT OF PENNSYLVANIA AVENUE.

Under the provisions of the charter of the Washington & Georgetown Railroad Company, and the act of congress of July 17, 1876, "authorizing the repavement of Pennsylvania avenue," the company were required to pay all the expense of the work of repaving inside its rails and for two feet exterior to this on each side. Along-side of the exterior rails of the track it was necessary to lay a curb of blue granite stone five inches wide the whole length of the pavement. *Held*, that the entire cost of all the paving on each side of their track to the sidewalks should not be computed together, and the charge against the company be in the proportion which those two feet bore to the entire distance from each exterior rail to the sidewalk, but that the company were chargeable with the entire expense of this curb. That the paving commissioners adopted the rule of a general apportionment of all the expense, and reported to the commissioners of the district on that basis the amount due from the railroad company, was not conclusive, as such report was not made their duty by the statute, and by the express language of the act the latter commissioners were directed to make the assessment on which the parties were to pay, and on which, if they did not pay a certificate should be issued which became an interest-bearing lien on their property. As it became necessary to support the track by underpinning in the process of the work, the expense thereof was properly charged to the railroad company. *Washington & Georgetown R. Co. v. District of Columbia*, U. S. S. C., May 7, 1883; 2 S. C. Rep. 865.

4. EVIDENCE—COMPENSATION OF EXPERTS—WITNESS NOT SWORN AS EXPERT.

Section 8, c. 70, Gen. St., provides "that the judge of any court of record in this State, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may in his discretion allow such fees or compensation as in his judgment may be just and reasonable." *Held*, that the matter of making such allowance being left to the discretion of the trial judge, this court will not reverse an order refusing such allowance, unless, perhaps, where there has been a palpably gross abuse of such discretion. This statute was designed to apply to cases where witnesses are called to testify to an opinion founded on special study or experience in any profession or calling, or to make scientific or professional examination of some matter connected with the issues in the case and then state the results, and not to cases where a witness is called upon to testify as to facts connected with the case, which have come to his personal knowledge while engaged in the ordinary practice of his profession, although his professional skill may have enabled him to observe such facts more intelligently. *Lemere v. McHale*, S. C. Minn., May 11, 1883; 15 N. W. Rep. 682.

5. EVIDENCE—UNTIL THE CHARACTER OF STATES' WITNESS HAS BEEN ATTACKED, IT CAN NOT BE BOLSTERED BY OTHER WITNESSES.

Defendant, on an indictment for murder in the first degree, was convicted of murder in the second degree, and sentenced to the penitentiary for ten years. The court permitted the prosecuting attorney, by other witnesses, to support the character of one of his witnesses which had not been

attacked. *Held*, this was clearly incompetent evidence. There would seem to be much ground for the opinion that a different verdict could have been returned by the jury, but that was a matter for them; so long as proper instructions were given, and there is evidence which supports the verdict, it is beyond our province to interfere. But nothing should occur during the trial, to influence the minds of the jury and lead them to a conclusion different from that to which they probably would have come, had improper evidence not been admitted, especially where, as here, the testimony is very conflicting, and where it would seem to require but a slight circumstance to turn the scale either way. Reversed. *State v. Thomas*, S. C. Mo.

6. FEDERAL COURTS—JURISDICTION—CITIZENSHIP.
Where a promissory note, negotiable by the law-merchant, is made by a citizen of one State to a citizen of the same State, and secured by a mortgage from the maker to the payee, an indorsee of the note can, since the act of March 3, 1875, sue in the courts of the United States to foreclose the mortgage and obtain a sale of the mortgaged property. *Tredway v. Sanger*, U. S. S. C., April 23, 1883; 2 S. C. Rep., 691.

7. FEDERAL SUPREME COURT—WRIT OF ERROR—WHEN BROUGHT.
No judgment or decree of a State court can be viewed in this court, unless the writ of error is filed in the court which rendered the judgment or decree within two years after the entry thereof. *Scarborough v. Pargond*, U. S. S. C., May 7 1883; 2 S. C. Rep., 877.

8. FEDERAL SUPREME COURT—WRIT OF ERROR TO STATE SUPREME COURT.
The question considered as to when the opinion of the highest court of a State may be examined for the purpose of ascertaining whether the judgment involves the denial of any asserted right under the Constitution, laws or treaties of the United States. In view of the statutory requirement that the Justices of the Supreme Court of Illinois shall file and spread at large upon the records of the court written opinions in all cases submitted to it, such opinions may be examined, in connection with other portions of the record, to ascertain whether the judgment or decree necessarily involves a Federal question within the reviewing power of this court. The act of the General Assembly of Illinois, in force July 1, 1875, validating loans or investments previously made in that State by corporations of other States or countries authorized by their respective charters to invest or loan money, is not in conflict with the contract clause of the Federal Constitution, nor with that part of the fourteenth amendment forbidding a State from depriving any person of property without due process of law. *Gross v. United States Mortgage Co.*, U. S. S. C., May 7, 1883; 2 S. C. Rep., 940.

9. INFANCY—INFANTS DEFENDING IN FORMA PAUPERIS IN FEDERAL COURTS.
Infant defendants in equity may appear and defend *in forma pauperis* in the Federal courts. *Ferguson v. Dent*, U. S. C. C., W. D. Tenn., March 21, 1883; 16 Rep., 68.

10. JUDGMENT—ALTERATION AFTER TERM.
This court has no power, after the term has passed, and a cause has been finally disposed of here, by a judgment of dismissal of a writ of error, to alter its judgment to one of affirmance, although if there had been a judgment of affirmance, interest would have been allowed to the defendant in error, on the amount of the judgment below, during the pendency of the writ, and in the judgment of dismissal no such interest was allowed. *Schell v. Dodge; Barney v. Isler; Barney v. Cox; Barney v. Friedman*, U. S. S. C., May 7, 1883; 2 S. C. Rep., 830.

11. MURDER IN SECOND DEGREE—KILLING WITH DEADLY WEAPON PRIMA FACIE.
The defendant was indicted for murder in the first degree, and convicted of murder in the second degree, and his punishment assessed at ten years in the penitentiary. The fourth instruction for the State, which is complained of as error, was to the effect that if defendant wilfully shot and killed the deceased, that in order to be justified on the ground of self-defense, he would have to establish such defense from the whole evidence, to the reasonable satisfaction of the jury. *Held*, if a defendant sets up a defense, it, of course, belongs to him to establish it to the satisfaction of the jury, in order to succeed in that particular issue, though, of course, his failure thus to succeed, would not authorize a conviction, if a jury from a review of the whole case, had a reasonable doubt of his guilt, and the usual instruction as to such doubt was given. When the State proves the killing with a deadly weapon, this, without more, makes out a *prima facie* case of murder in the second degree; any matter of excuse, justification or extenuation rests with accused. *State v. Jones*, S. C. Mo.

12. PATENT — EVIDENCE — UNRESTRICTED PUBLIC USE.
Where an inventor allows the unrestricted use of his invention by another, without injunction of secrecy or other condition, for more than two years prior to his application for a patent, although such use may be secret, this will constitute a public use and render the patent subsequently issued void. As the evidence in this case shows that there was a public use of the invention with the consent of the inventor for more than two years prior to the application, the patent is void. *Manning v. Cape Ann Isinglass & Glue Co.*, U. S. S. C., May 7, 1883; 2 S. C. Rep., 860.

13. REMOVAL OF CAUSES — CASE ARISING UNDER CONSTITUTION OF THE UNITED STATES.
Where a railroad corporation sets up as a defense that its charter was a grant by the State, giving to the railroad company, without any qualification, the right to prescribe upon what terms and at what rates freight should be transported on the road, and that this grant was protected by the Constitution of the United States, and that a subsequent statute of the State upon the subject impairs the validity of such grant in violation of the Constitution, such defense involves a question arising under the Constitution of the United States, and the case is removable from a State court under the second section of the act of 1875. *People v. Chicago, etc. R. Co.*, U. S. C. C., N. D. Ill., June 14, 1883; 16 Fed. Rep., 706.

14 REMOVAL OF CAUSES—LOCAL PREJUDICE ACT.
Where a suit was begun in a State court before the passage of the act of 1875, an application for removal under the separable controversy provision must have been made at or before the term at which the cause could be first tried after that act went into operation, to entitle a party to have the case removed into the circuit court. Under the local-prejudice act there can be no removal unless

all the necessary parties on one side of the suit are citizens of different States from those on th other. It is not enough that there be a separable controversy between parties having the necessary citizenship, nor that the principal controversy is between citizens of different States. If there are necessary parties on one side of the suit, citizens of the same State with those on the other, the circuit court can not take jurisdiction. *Myers v. Swann*, U. S. S. C., April 23, 1883; 2 S. C. Rep., 685.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES ANSWERED.

Query 57. [17 Cent. L. J. 120.] A railroad company graded a road across a stream and obstructed it with piling. The intention of the company was to throw themselves in communication with the gulf by means of steamers running up to where said road crossed said stream. The legislature of the State of Florida afterwards declared said stream navigable to a point three miles above where said road-bed crossed said stream. Said road is not completed. A company is chartered under the general act for improving the navigation of said stream. What will be the proper remedy at law, or otherwise, to remove the obstructions of said stream, so that steamers which now come up to said road may pass up to the point three miles above said road? Can the said corporation remove said piling without resort to the courts? Please give authorities referred to.

Sumpterville, Fla. A. C. C.

Answer No. 1. There are two classes of streams in nearly all States. One, navigable for certain kinds of crafts certain distances within the State only, and not visited by vessels from without. These streams are highways for trade and commerce within the State. The other is navigable streams leading into other navigable waters without the State. These latter streams are navigable highways for commerce between the States. Over the first class the State has exclusive jurisdiction. If, by legislative act, Florida has declared the stream navigable—that is, a highway,—and prior to said act a railroad has built a bridge across said stream, it will be the duty of the State or of the county, or other authority wishing to perfect said highway, to pay the necessary damages in some manner before removing the obstruction referred to, I think. Depew v. Board of Trustees, etc., 5 Ind. 8. Over the second class of streams, the State has equally supreme authority, in the absence of congressional enactment, so far as they are within her territorial limits. Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245; State of Pennsylvania v. Wheeling Bridge Co., 13 How. 518; Rundle v. Delaware, etc. Canal Co., 14 Id. 80. Congress may interfere and deprive the State of Florida of all jurisdiction over the stream, by virtue of art. 1, sec. 8 of the Constitution of the United States. We have not been able to find any congressional enactment that would reach this case, however. If, by congressional enactment, the State has lost her jurisdiction over the waters of the stream, then it is doubtful whether a prosecution for maintaining a nuisance could be maintained under the laws of the State; in fact, the act of the Florida legislature would be a nullity. If I am not right in the foregoing, then an action to abate a nuisance would undoubtedly lie against the parties maintaining the obstruction across the navigable stream—either a civil action by some citizen, or make a State case of it. Not because the legislature of the State has declared the stream navigable, because if this is necessary, then we should say, that compensation in damages would follow to the railroad company; but because as a matter of fact the stream is and was a public highway without reference to the act of the legislature. If it is a public highway, obstructed without legislative right, any citizen would probably have a right to remove the unlawful obstruction, as he would to clear obstructions placed on any other highway. Neaderhouser v. State, 28 Ind. 257. LEX.

Greenfield, Ind.

Answer No. 2. Public nuisances may be abated by the act of party, in cases where the abating party suffers from the nuisance a special and peculiar injury, not suffered by the public in general. Lincoln v. Chadbourn, 56 Me. 197; State v. Parrott, 71 N. C. 311 and cases cited. Brown v. Perkins, 12 Gray. 89, 101 holds "an individual may remove a common nuisance when it obstructs his individual rights, and cannot be called in question for so doing."

Le Sueur, Minn. ORA J. PARKER.

Query 63. [17 Cent. L. J. 140.] A person became a member of "The Knights of Honor," and received a policy or certificate of insurance upon his life, by the terms of which the amount to be paid was made payable on his death "to the order of his will." He subsequently made a will by which he, in substance, directed that the proceeds of the insurance should be invested at interest and should be paid to his children as they arrived at majority, and appointed executors to carry out the provisions of the will, but does not specifically direct by whom the insurance money is to be collected and controlled. He died and his estate is insolvent. Under these facts does the money vest absolutely in the children as beneficiaries of the policy to the exclusion of creditors of deceased, or does it vest in his estate to be first administered and then pass to his children, if at all, only after the debts are paid?

Answer. The querist will do well to see Hirschl on on the Law of Fraternities and Societies, now in press, Wm. H. Stevenson, Publisher, St. Louis, Mo.

RECENT LEGAL LITERATURE.

BENJAMIN ON SALES.—Benjamin's Treatise on the Law of Sale of Personal Property, with references to the American Decisions. Third English Edition with the Author's Sanction and Revision. By Arthur Bellby Pearson and Hugh Fenwick Boyd. Fourth American Edition, by Charles L. Corbin, in Two Volumes. Jersey City, 1883: Frederick D. Linn & Co.

This American edition of this really great work is properly termed authorized, for as appears from a card of the English publisher which is prefixed to it, it is printed from advance sheets purchased from him by the American publisher. The work itself is too well known to the profession everywhere to require comment or criticism. The recent retirement of the eminent author from the scene of his active labors at the English bar and the extra-

ordinary honors which were heaped upon him upon that occasion by his brethern, lend an additional interest to the reissue of this work which is a lasting monument of his unprecedented success.

TWENTY-EIGHTH KANSAS REPORTS. Reports of Cases Argued and Determined in the Supreme Court of the State of Kansas. A. M. F. Randolph. Vol. 28 Containing Cases Decided at the January and the July Terms, 1882.

The State of Kansas has one of the ablest courts in the country, which manages to keep pretty well on the heels of its docket. Besides, by a statute these judges are required to write a syllabus to each opinion as it is delivered. The labors of the reporter must therefore be comparatively slight. Why is it, then, that the publication of these reports is delayed from six monts to one year after the decisions are rendered? It seems to us our brethren in Kansas have a legitimate ground of complaint here.

THIRTY-SIXTH NEW JERSEY EQUITY. Reports of Cases Decided in the Court of Chancery, the Prerogative Court, and, on Appeal, in the Court of Errors and Appeals of the State of New Jersey. John H. Stewart, Reporter. Trenton, N. J., 1883: The W. S. Sharp Printing Co.

This volume abounds in interesting matter, not the least of which are Mr. Stewart's exhaustive and learned notes to many of the more important decisions.

TAYLOR'S PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE. The Principles and Practice of Medical Jurisprudence. By the late Alfred Swaine Taylor, M.D., F.R.S., Fellow of the Royal College of Physicians of London. Third Edition. Edited by Thomas Stevenson, M.D., London. Two volumes. Philadelphia, 1883: Henry C. Lea's Son & Co.

This late edition of this standard work will be found most useful to the profession. The distinguished author's treatment of the many difficult and interesting topics is of course always satisfactory, but the chapters on Poisoning and on Wounds and Personal Injuries, are particularly full and interesting. The learned editor has added many illustrative cases of recent date, including the Lamson poisoning case and the trial of the Peltzer brothers for the murder of M. Bernays.

LEGAL EXTRACTS.

MISCARRIAGES OF JUSTICE.

The English Attorney-General, in moving the second reading of the court of criminal appeals bill, on the 2nd ult., said: "Everyone knew that wrong verdicts were often given in civil cases, and that first trials were constantly found to be incorrect. In such cases of a criminal or *quasi*-criminal character, in which appeals were now permitted, he found that in the last six years 876 appeals had been heard, and, though a trained judgment had been brought to bear on all the cases, the result of the first trial has been reversed in 44 per cent. of the number. If that happened in cases involving questions of fact, in which every one concerned was anxious that justice should be done, he might fairly regard it as a very strong argument in favor of the bill. What he suggested was the obvious probability that juries, however desirous of doing their duty, sometimes made grievous mistakes. It was, he knew, the habit of those who took part in trials, and even of judges of great experience, to aver that they never knew cases of wrongful conviction, but that was necessarily so, for a judge could only form his opinion of a case by facts elicited or apparent at the trial, and the appearance of guilt in such cases at once justified the assertion of the judge, and caused the error. His own experience of these matters was very indirect, but he had come to the conclusion that a greater number of innocent people suffered than was generally supposed. It had already been the duty of his right honorable friend the Home Secretary to set at liberty twelve different persons convicted of the gravest crimes, and this had been done either because their innocence had been fully established or because their guilt was so exceedingly doubtful that he dared not keep them in custody. In every one of these cases facts long concealed had come almost miraculously to light; deathbed confessions of the real criminal and the depositions of fellow-prisoners had proved the error of the original convictions. And even if this occurred in every case in which an innocent man was convicted, the Secretary of State was helpless, and had no means of making the necessary investigations. He had no machinery by which that could be done, no power to examine witnesses, or to compel persons to give evidence. All he could do was to listen to statements without being able to test them, and so to surmise, but not to establish, the truth. Nor could the judge who presided at the trial under review give the Home Secretary much real assistance, for his impressions and recollections of the case were necessarily derived from what took place at the trial, and might not lead to the right appreciation of the new circumstances which formed the ground of the appeal. The result was extreme injustice, and the pardon, after, perhaps, years of suffering of an innocent man, whose former position could never be restored to him. A man so convicted could never be restored to the position of innocence which he occupied before, and such a pardon was rather an acknowledgment of the failure of justice than the exercise of the prerogative of mercy."—*Australian Law Times.*